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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-19

INTERCONTINENTAL PROMOTIONS, INC.,
Petitioner,

vs.

MIAMI BEACH FIRST NATIONAL BANK, and FRED R. BAISDEN, as executors of the Last Will and Testament of W. B. McDONALD, JR., deceased, and NEW AMSTERDAM CASUALTY CO.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

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PREFACE

This case arises out of the United States District Court, in and for the Southern District of Florida, Miami Division, and was instituted by the Petitioner, INTERCONTINENTAL PROMOTIONS, INC., as a diversity of citizenship action, for the alleged breach of a contract between itself and WILLIAM B. MacDONALD, JR., for the staging, con-

ducting, handling and holding of a public pugilistic exhibition for reward to determine the heavyweight champion of the world between SONNY LISTON, the then champion, and CASSIUS CLAY, the then Number One contender, which was actually held in Miami Beach, Dade County, Florida, on February 25, 1964. The Respondents, THE MIAMI BEACH FIRST NATIONAL BANK and FRED R. BAISDEN, as executors of the Last Will and Testament of WILLIAM B. MacDONALD, JR., deceased, were substituted in the place and stead of WILLIAM B. MacDONALD, JR. (who died during the pendency of this litigation), and NEW AMSTERDAM CASUALTY COMPANY, were the defendants in the trial court.

The Petitioner's skimpy presentation of the "Opinions Below" and the statement of the case are replete with omissions and inaccuracies and presented in a fashion to create the superficial impression that the Supreme Court of the United States ought to take jurisdiction of this cause, after final disposition in the United States Court of Appeals for the Fifth Circuit, on its second appearance in that Court, in order to now implement the Federal doctrine of abstention in deference to a state court adjudication of a state legal issue in avoidance of the determination of a Federal question; and to reconcile alleged conflict between the two (2) appellate court decisions in this same litigation. A full and complete presentation of the history and facts of this case is necessary and will demonstrate the following:

A. That the doctrine of abstention by the Federal judiciary is inapplicable in this diversity of citizenship action instituted by the Petitioner, who now, at the eleventh (11th) hour, after having originally selected the Federal system in which to litigate its cause, urges deference to the state courts, where there is no underlying Federal ques-

tion which will be avoided by such action. The Petitioner's position, upon scrutiny, demands an extension of the abstention doctrine to every diversity of citizenship case instituted in a United States District Court, governed by *Erie R. Co.* v. *Tompkins*, 304 US 64, 58 S.Ct. 817; so that all United States Courts of Appeals will become intermediary appellate tribunals functioning as way-stations on the ultimate journey to the Supreme Court of the United States, which would be required to exercise supervisory jurisdiction and review every case in order to guarantee that in diversity of citizenship actions state law was duly applied, notwithstanding the absence of any underlying Federal or constitutional issue. Additionally, it will be seen that in the history of this case if the abstention doctrine were to have been appropriately applied, the time to have done so would have been on the first appearance of this cause in the Supreme Court of the United States, on a petition for the issuance of a writ of certiorari from the first decision of the United States Court of Appeals for the Fifth Circuit, which was entitled *Inter-Continental Promotions, Inc.* v. *MacDonald*, 367 F. 2d 293 (5th Cir., 1966), cert. den., 393 US 834, 89 S.Ct. 105 (case No. 3).

B. The United States Court of Appeals for the Fifth Circuit, in the decision rendered on the second (2nd) appeal, did not overrule its prior decision rendered on the first (1st) appeal; and did not in any way whatever invalidate any portion of the applicable state statutes. On the first appeal, the state statute was interpreted, and after certiorari was denied by the Supreme Court of the United States, the cause was remanded for trial of a specific issue of fact. On the second appeal, the United States Court of Appeals for the Fifth Circuit decided that the evidence was overwhelming on the issue of fact for which the case had been remanded to the trial court, and that

the trial court's ruling on the evidence was clearly erroneous, in violation of Federal Civil Procedure Rule 52(a). Moreover, this being a diversity of citizenship case, the applicable law of the State of Florida pertaining to the doctrine of the law of the case would have authorized the appellate court, had it been so inclined, to overrule its earlier decision.

FLORIDA STATUTES INVOLVED

The Florida Statute involved in this case is Chapter 548 entitled "Pugilistic Exhibitions", and is comprised of four (4) sections, namely, Florida Statutes, Chapter 548.01-548.04. These provisions are somewhat lengthy and, therefore, rather than set them out in full in the body of this brief, their text is set forth in the Appendix to this brief.

HISTORY OF THE CASE

A. Procedural History of the Case from Its Inception Up Through and Including the Institution of the Second (2nd) Appeal.

The procedural history of this case began with the filing of the original complaint on January 4, 1965. (R 1-10) On January 25, 1965, the Respondents (as Defendants below), moved to dismiss the complaint (R 12), on the dual ground that it did not state a cause of action and that the contract sought to be enforced was illegal. On January 28, 1965, the Petitioner (Plaintiff below) moved to amend the complaint (R 16-18), and insert the following paragraph (R 17):

> "Said contract concerned the holding and conducting of a pugilistic contest which was to be held on February 25, 1964, between Charles 'Sonny' Liston and Cassius M. Clay, Jr. *Said contest was held by and*

> *under the auspices of the Veterans of Foreign Wars of the United States* and was licensed and/or permitted by the City of Miami Beach, Florida, as a pugilistic exhibition held under the auspices of the Veterans of Foreign Wars of the United States. In this connection, plaintiff specially pleads Florida Statutes Annotated Section 548.03 as being the statutory basis for (a) the legal holding and conducting of said pugilistic encounter, and (b) the legality of said contract." (Emphasis supplied)

On April 17, 1965, the trial court entered an "Order of Dismissal". (R 112-114) In that order, the trial court concluded that pugilistic exhibitions for reward were condemned as a felony in the State of Florida, carrying a penalty of up to $5,000.00 or imprisonment for not more than five (5) years (Florida Statutes, Chapter 548.01). Under an amendatory provision to that Act, namely, Florida Statutes, Chapter 548.03, pugilistic exhibitions for reward are permissible if "held by and under the auspices of" one of the named organizations, among which is the VFW. The trial court held that the contract between the parties was to conduct a public display of pugilism for reward between parties not embraced within the exemption contained in the amendatory provision of the Act, and that such contract was illegal and unenforceable. That order of dismissal was appealed to the United States Court of Appeals for the Fifth Circuit and reversed. *Inter-Continental Promotions, Inc.* v. *MacDonald*, 367 F. 2d 293 (5th Cir., 1966). The following four (4) matters of significance were decided on that first appeal:

1. That there is no doubt that a contract to perform an illegal act is void and will not be enforced in Florida courts.

2. That the Florida legislation "prohibits one thing—public displays of pugilism for reward". (367 F. 2d at 297)

3. That on remand, the "only question of fact is the far simpler one of whether the fight *actually* was held by and under the auspices of one of the approved groups". (Emphasis added) (367 F. 2d at 303)

4. That the trial court, in rendering the initial decision that the contract was void because neither of the parties was an exempt entity listed in the amendatory provision of the Statute (Section 548.03), and the contract did not provide that the fight shall be held by one of those organizations, gave no effect to the amended complaint. (367 F. 2d at 301-302)

The Defendants-Appellees (Respondents in this Court) filed a timely petition for rehearing which pended until the same was denied on May 8, 1968. It is at this juncture where the Petitioner overlooked and failed to call attention to the fact in its presently pending petition for a writ of certiorari, that such a petition was heretofore filed in the Supreme Court of the United States, by the now-Respondents, in the October Term of 1968, which was assigned Case Number 1526. In that petition for a writ of certiorari it was asserted that the initial decision of the United States Court of Appeals for the Fifth Circuit passed on questions of state law which, under the Federal doctrine of abstention, should more appropriately have been decided by State courts. The Petitioner in this proceeding relies heavily upon the case of *United Gas Pipe Line Co.* v. *Ideal Cement Co.*, 369 US 134, 82 S.Ct. 676; however, when it was respondent, when this case first appeared in the Supreme Court of the United States, it stated on page 6 of its "Brief of Respondent":

". . . The case sub judice and UNITED GAS PIPE LINE CO. v. IDEAL CEMENT CO., are not analogous on the facts nor do they pose analogous points of law."

On October 14, 1968, certiorari was denied. See: *The Miami Beach First National Bank and Fred R. Baisden,*

as Executors, etc., et al., Petitioners, v. *Inter-Continental Promotions, Inc.,* 393 US 834, 89 S.Ct. 105 (case #3). It would appear that it was at that stage of the proceedings, when this case first appeared in the Supreme Court of the United States, after the United States Court of Appeals for the Fifth Circuit first interpreted and decided the applicability of Florida Statutes, Chapter 548 to the contract sought to be enforced in this diversity of citizenship action, that the doctrine of Federal abstention should have been applied, if it was ever going to be applied to this litigation. As noted, that was the point raised and the Supreme Court of the United States denied certiorari.

On remand of this cause to the trial court, on January 22, 1969, an order on the mandate was entered (R 146), granting the Plaintiff's motion to amend its complaint and allowing the amended complaint to be filed within ten (10) days. On January 31, 1969, the Plaintiff filed its amended complaint. (R 147-150) The Plaintiff (the Petitioner in this Court) alleged, inter alia, that the subject matter of the contract which it sought to enforce was the holding and conducting of a pugilistic contest which was held under the auspices of one of the organizations named in Florida Statutes, Chapter 548.03 (Paragraph 4 of the amended complaint—R 148). On March 5, 1969, the Defendants filed their answer (R 159-161), and in answering Paragraph 4 of the complaint, specifically denied that the contract provided that the prize fight was to be conducted or held by and under the auspices of any organization, much less one of those named in Florida Statutes, Chapter 548.03, and, further, denied that the subject prize fight was actually held by and under the auspices of any organization, much less one of those named in the aforementioned Statute.

This cause was tried non-jury, commencing on October 28, 1969, and was concluded on October 30, 1969. (TR 1-494) On November 18, 1969, the trial court entered its "Findings of Fact, Conclusions of Law and Final Judgment". (R 725-730) Regarding the trial court's findings, it is legally and factually pertinent to note that the trial court specifically found that the applicable statute was penal in nature and prohibited pugilistic exhibitions except "when conducted by and under the auspices of various named organizations, including the Veterans of Foreign Wars", and that "there is testimony which indicates that the fight was held under the auspices of the VFW, but not by the VFW". (R 728) Thereafter, on November 28, 1969, the Defendants filed their post-trial motions (R 732-740) and, inter alia, asserted the following:

> 1. That the Court erred in not dismissing the Plaintiff's case on the ground that the uncontradicted evidence established that the contract between the parties accomplished an unlawful purpose, namely, a public display of pugilism for reward, contrary to and in violation of Florida Statutes, Chapter 548, in that, the LISTON-CLAY fight held in Miami Beach, Dade County, Florida, on February 25, 1964, was not held by and under the auspices of any of the exempted organizations named in Section 548.03.
>
> 2. That the court overlooked and failed to consider that the contract between the parties was impossible of legal performance, in that, neither of the parties was qualified to, nor could either hold and conduct a public display of pugilism for reward in the State of Florida.
>
> 3. That the court's findings failed to include an express finding based on the uncontradicted evidence that the fight between LISTON and CLAY held on February 25, 1964, in Miami Beach, Florida, was a public display of pugilism for reward which was not

held by and under the auspices of any of the named organizations in Florida Statutes, Chapter 548.03.

4. That the Conclusion of Law numbered 2 was clearly erroneous because the uncontradicted evidence established that the contract between the parties, from its operation, accomplished an unlawful purpose and that such contract was, therefore, invalid and unenforceable.

On January 2, 1970, the trial court denied the post-trial motions that asserted, inter alia, the grounds specified above.

On January 28, 1970, the Defendants instituted the second appeal and thereafter duly perfected that appeal.

B. The Facts Established at Trial

This statement of facts is based solely upon undisputed facts or those testified to by the Plaintiff (Petitioner), its duly authorized representatives or its witnesses, and will be related in strict accordance with the record in a light most favorable to the Petitioner.

SONNY LISTON, the World Heavyweight Champion, met CASSIUS CLAY, the Contender, in the Miami Beach Convention Hall, located in Miami Beach, Dade County, Florida, on February 25, 1964, and engaged in a public display of pugilism for reward. That fight, according to HAROLD CONRAD, the Petitioner's representative on the local scene in Miami Beach, Florida, had the second largest monetary gross of any fight in history, namely, $4,200,000.00. (TR 360) According to the sworn testimony of GARLAND D. CHERRY, Attorney for, Secretary of, and a member of the Board of Directors of the Petitioner-corporation (TR 43), the fighters received $1,050,000.00. (TR 464-465)

The background, which wholly excludes any possibility that the subject fight was held by and under the auspices of the VFW, began to unravel on July 5, 1962, when JAMES and ROBERT NILON entered into a contract with CHARLES "SONNY" LISTON to form the Petitioner-corporation and provide that SONNY LISTON would own fifty (50%) percent of the stock of that corporation and fight exclusively for the Plaintiff. (DX 1 ident.) On November 5, 1963, the Petitioner entered into a contract with LISTON, CLAY and what is known as the LOUISVILLE SPONSORING GROUP (a joint venture owning CLAY's right to fight), by virtue of which it was agreed that LISTON and CLAY would engage in a boxing match for the heavyweight boxing championship of the world to be staged no earlier than January 20, 1964, and no later than April 15, 1964. (DX 3 ident.) Paragraph 1 on page 2 of that contract provides as follows:

> ". . . said match to be promoted by Inter-Continental or its nominee . . . Said match shall be conducted in all respects in conformity with the laws of the state and city wherein said match is held. . . ."

Paragraph 2 of that contract provides:

> "Inter-Continental, or its nominee, shall promote the match—. . . The match shall be conducted in accordance with the laws of the city and state wherein said bout is to be held, as well as all of the applicable rules and regulations of said city and state, 'athletic commission', and any other federal, state or local governmental body having jurisdiction thereof. . . ."

Paragraph 10 of that agreement provides:

> "In the event Inter-Continental deems it necessary or desirable to use a nominee, it nevertheless warrants, represents and agrees that it will remain solely responsible and liable to Liston, Clay and LSG for the

performance of all covenants, promises, payments, performances, and conditions undertaken by it and contained in this Agreement."

One week earlier, on October 29, 1963, the same parties entered into a so-called re-match contract conferring on the Petitioner-corporation, for the sum of $50,000.00, the sole and exclusive right to promote CLAY's next fight in the event he beat LISTON and became the heavyweight champion of the world. (DX 2 ident.) The contracts entered into prior to the contract of December 19, 1963, between the parties to this litigation, set the stage for the holding of a world championship prize fight, in which SONNY LISTON, the World Champion, owned fifty (50%) percent of the Petitioner-corporation, which owned the sole and exclusive right to promote CLAY's next fight if he became world champion, with an express obligation imposed on the Petitioner-corporation to conduct a lawful fight in accordance with the law of the place where the fight was to be held.

With the stage thus set, as stated above, on December 19, 1963, the Petitioner-corporation entered into the agreement (PX 1) with WILLIAM B. MacDONALD, JR., by virtue of which MacDONALD, for the price of $625,000.00 was sold the right to stage the "live gate" aspect of the LISTON-CLAY fight to be held on February 25, 1964, at the Miami Beach Convention Hall, in Miami Beach, Florida. Under Paragraph 1 of that contract, the Petitioner obligated itself to produce LISTON and CLAY at the appointed time and place in order that "they will then and there engage in a boxing contest with each other, for fifteen rounds or less, for the Heavyweight Boxing Championship of the world." It will be seen that under the contract between the parties, each, every and all requirements for actually holding the fight were undertaken respectively by

the parties to the contract. Under Paragraph 2 of the agreement, MacDONALD undertook to print and sell admission tickets, collect the proceeds of ticket sales, arrange all seating, make necessary arrangements for the press, pay all local, state and federal taxes on admissions, arrange and pay for the undercard preliminary fights, pay all fees and expenses of the controlling boxing commission, advertise and promote the live gate, make press releases, and do any and all things reasonably necessary for the enhancement of the live gate. Paragraph 6 of the contract imposed the liability on MacDONALD for all expenses in connection with the promotion of the live gate, but specifically excluded any liability by MacDONALD to either LISTON or CLAY for their compensation for participating in the match or for any training camp or other expenses incurred by the fighters. Under Paragraph 12 of the contract, the Petitioner, INTER-CONTINENTAL, retained all ancillary rights for the promotion, sale and exploitation of the match, including but not limited to radio, television and movie rights. Under that provision, program rights to the fight at the Miami Beach Convention Hall were reserved to MacDONALD. Under Paragraph 13 of the contract, the Petitioner, INTER-CONTINENTAL, was obligated to make the preparations and arrangements for the installation of platforms, staging, lines, and other equipment required for televising, broadcasting and filming the fight. It is undisputed that these contract provisions imposed upon the parties the sole and exclusive duties and obligations to stage, hold and conduct the fight. The contract is conspicuously silent in regard to the fight being held by and under the auspices of any organization named in Florida Statutes, Chapter 548.03. By its very terms, the contract excludes anyone other than the parties from actually holding the fight.

At the trial, the Petitioner called four (4) witnesses on its case in chief, namely, W. BILL GLICK, Executive Secretary of the Boxing Commission of the City of Miami Beach (TR 31-42), GARLAND D. CHERRY, Secretary of the Petitioner-corporation, its Attorney and a member of its Board of Directors (TR 42-112), MAX LENCHNER, Chairman of the VFW Post 3559 Boxing and Wrestling Committee (TR 115-122), and BENJAMIN PEISER, a member of VFW Post 3559. GLICK testified that, as Executive Secretary of the Boxing Commission of the City of Miami Beach for the past eleven (11) years, he attended the fight held on February 25, 1964, and that he did not have among his subpoenaed records any record that reflected that the Veterans of Foreign Wars had any connection with the fight held on February 25, 1964. (TR 33) On direct examination, GLICK was asked if he was conversant with the rules and regulations of the Miami Beach Boxing Commission, and he testified that he was. (TR 33) On cross-examination, GLICK testified that the rules and regulations of the Miami Beach Boxing Commission applicable to the LISTON-CLAY fight held on February 25, 1964, prohibited either contestant from owning any interest in the other, and that if it had been disclosed to the Boxing Commission that LISTON owned an interest in CLAY, in the event that CLAY won, the fight would not have been held and would have been considered illegal by the municipality. (TR 39-40) On re-direct examination by the Petitioner, who called GLICK as its witness, GLICK testified that such rule was in effect when the subject fight was held. (TR 41) MAX LENCHNER, the Chairman of the Boxing and Wrestling Committee of the VFW Post 3559, was asked on direct examination by Petitioner about the VFW's participation in the fight. (TR 118-119) The best that LENCHNER could state was that CHRIS DUNDEE, a fight promoter in Miami Beach, would tell them

that the VFW was sponsoring a fight and that we would appear at all fights promoted by MR. DUNDEE. In explaining how that worked, LENCHNER testified that CHRIS DUNDEE would say:

> " 'We are having a fight next week, Max. Be there with the men.' *That's the way it is.*" (Emphasis added)

The Plaintiff offered in evidence a composite exhibit (PX 17) consisting of a letter and a check. The letter in full reads as follows:

> "DUNDEE-MacDONALD ENTERPRISES, INC
>
> December 26, 1963
>
> Veterans of Foreign Wars Post 3559
> Mr. M. Lencher, Commander
> 440 - 16th Street
> Miami Beach, Florida.
>
> Dear Mr. Lencher:
>
> We wish to confirm our understanding with you in that Dundee-MacDonald Enterprises, Inc. will contribute $500.00 to the Veterans of Foreign Wars Post 3559 with sponsorship and use of your name with the Liston-Clay World's Heavyweight Championship bout to be held at the Miami Beach Convention Hall on the evening of February 25, 1964.
>
> Very truly yours,
>
> /sd/
> Christ Dundee, General Manager
>
> FJL/h
> cc: Wm. B. MacDonald, Jr."

The check part of the composite exhibit (PX 17) is for the $500.00 referred to in the above-quoted letter and is dated March 4, 1964. On cross-examination, LENCHNER candidly testified that neither he nor the VFW had anything

whatever to do with putting on the subject fight. That testimony reads as follows (TR 120-121):

> "Q. Now, you had nothing whatever to do with putting on this fight, did you?
>
> A. That's right. I have nothing to do with it whatsoever.
>
> Q. Neither did the Veterans of Foreign Wars?
>
> A. That's correct."

BENJAMIN PEISER, a member of VFW Post 3559, the Plaintiff's other witness, testified that although he attended the fight as a member of the VFW and stood at an entranceway to prevent unauthorized people from coming in, he had nothing to do with the taking of tickets or ushering of people to seats. (TR 125) Additionally, PEISER testified that neither he nor the Veterans of Foreign Wars in any way contributed to the staging, conducting or putting on of the fight. That testimony reads as follows (TR 125-126):

> "Q. You didn't on behalf of the Veterans of Foreign Wars in any way contribute to the staging, holding, conducting or putting on this fight, did you?
>
> A. No."

Hence, it is apparent that the Petitioner, on its case in chief in the trial court, proved not only that the contract between the parties was illegal in requiring the performance of an illegal act; but in fact the performance of the contract accomplished an illegal purpose. The only other witness that the Petitioner called on its case in chief, as heretofore stated, was GARLAND D. CHERRY, who made no statement whatever in regard to the fight being held by and under the auspices of the Veterans of Foreign Wars. Other than testifying that the Petitioner had produced the fighters at the appointed time and place

and that the Petitioner received $225,000.00 of the $625,000.00 from MacDONALD, CHERRY frankly admitted that he prepared the so-called re-match contract (TR 66-67), and that "in the back of my mind there was always a—some question about the propriety or the legal or the lawfulness of Liston being a stockholder in Inter-Continental and at the same time being a contract party for promotion agreement." (TR 59) CHERRY also admitted that the re-match contract was kept separate from the contract between LISTON and CLAY for a championship bout because he did not want the press, public or anyone to know about the re-match contract (TR 76), and had the prohibition of the rule that GLICK testified about in mind in keeping those documents separate and secret. (TR 80) When CHERRY testified as the Petitioner's rebuttal witness, he even more frankly admitted that the re-match contract was a calculated evasion of World Boxing Association Regulation No. 10, which is identical to the rule that GLICK testified about. (TR 453) When called as an adverse witness by the Respondents, CHERRY admitted that he testified under oath before a committee of the Senate of the United States as follows (TR 148-149):

> "I would say that we could probably pick any of the states that we wanted to promote a fight in and there would be *some device* or some way to permit that fight to come to the state." (Emphasis added)

The additional witnesses that testified at the trial not only further corroborated the fact that the Petitioner had proven, namely, that the fight was not held by and under the auspices of the Veterans of Foreign Wars, but created a tidal wave of proof to that effect. JAMES J. McDONNEL, the owner and operator of Andy Frane Service, crowd control engineers and contractors, entered into a contract dated February 20, 1964, with the late WILLIAM

B. MacDONALD, JR. to handle the LISTON-CLAY fight (DX 8), and was paid $4,000.00. (DX 9) The contract expressly provides that the Andy Frane Service would supply the necessary ushering and ticket-taking personnel and guard all entranceways into the building to prevent illegal entry.

McDONNEL testified that the services called for by the letter-contract of February 20, 1964 (DX 8) were performed and that he had three hundred twenty-five (325) men at the fight and that his men exclusively handled ticket taking, ushering and admission control.

OSCAR MARKOVICH, who operates food and refreshment concessions at theaters, restaurants and auditoriums throughout the country, and who has that concession at the Miami Beach Convention Hall, testified that his men did all of the vending at the fight. (TR 174) MacDONALD corresponded with MARKOVICH on February 7, 1964, in order to coordinate MARKOVICH's function at the fight. (DX 10) MARKOVICH testified that he attended the LISTON-CLAY fight at the Miami Beach Convention Hall on February 25, 1964, and that the VFW performed no function but merely had some members present. His testimony in that respect reads as follows (TR 175-176):

"Q. Were there Veterans of Foreign Wars present at the fight?

A. Yes, there was.

Q. Isn't it a fact that they perform no function other than being present, sir?

A. I have never seen them perform any functions but I have seen them there.

Q. They are just merely present?

A. So far as I can see.

Q. They don't take tickets?

A. No, sir.

Q. They don't usher people to seats?

A. No, sir.

Q. And they don't have anything to do with refreshment concessions?

A. Nothing whatsoever.

Q. And they have nothing to do with bringing the fight to the auditorium or staging it, that you know of?

A. No, sir."

FRANK LEWIS, MacDONALD's comptroller, a former accountant with Arthur Anderson & Co., was actually MacDONALD's right-hand man in carrying out all phases of actually holding the subject prize fight. He testified that after execution of the contract of December 19, 1963, they did everything required to hold this fight, namely, rent the auditorium, worked with seating engineers on laying out the hall, hired public relations and advertising firms, contracted for printing of tickets, hired crowd control engineers and contracted for the preparation and selling of programs, and participated in all phases of actually putting on and holding the fight. (TR 282-285) LEWIS testified that the VFW had nothing to do with holding, staging or conducting the fight and merely received a contribution of $500.00. His testimony in that respect reads as follows (TR 285-286):

"Q. And in your capacity as treasurer of the corporation you participated in the negotiation of all of the phases of holding this fight as you just described, is that correct?

A. Yes, definitely.

Q. What, if anything, the Veterans of Foreign Wars, Post 3559, have to do with holding, staging or conducting the Liston-Clay fight that was held on February 25, 1964?

A. Nothing. We used their name and paid them a contribution for that.

Q. Do you remember how much the contribution was?

A. Yes, $500. This was arranged for by Chris Dundee and we paid it, Dundee-MacDonald Enterprises, Inc."

The only other testimony regarding the VFW is the statement made by the Plaintiff's exclusive agent, general manager and man-on-the-scene, MR. HAROLD CONRAD, to the effect that the VFW is merely given a handout. (TR 404-405) Conrad's specific testimony reads in the record as follows (TR 405):

"Q. Do you know what, if any, connection that organization had with this fight?

A. Well, I think there was *some kind of a handout* that these guys had been having for years in this town. You can't put on a fight unless they are at the door. I don't know what the details are. I have seen them down through the years." (Emphasis added)

C. The Second Appeal and the Decision of the United States Court of Appeals for the Fifth Circuit Rendered on April 9, 1971.

The decision of the United States Court of Appeals for the Fifth Circuit, on the second appeal of this cause, which is sought to be reviewed, is set forth in full in the appendix to this brief. The decision has not, as of the date of the drawing of this brief, been published.

Reading that decision establishes the following:

1. That contrary to the contention of the Petitioner, The United States Court of Appeals for the Fifth Circuit followed its prior decision, and decided that on remand and a trial of the cause on the merits, it was proven by overwhelming evidence that the sub-

ject public display of pugilism for reward, contrary to the public policy of the State of Florida, as pronounced in Florida Statutes, Chapter 548, was not held by and under the auspices of the VFW. The pertinent language of the holding reads as follows:

"Florida has declared a public policy forbidding the performance of prize fighting and pugilistic exhibitions for reward. This prohibition is contained in Florida Statutes Annotated § 548.01, a statute providing criminal penalties of a fine of not less than $2,500 nor more than $5,000, or imprisonment for not more than 5 years. Section 548.03, however, excepts from the prohibition boxing exhibitions which are 'held by and under the auspices of' certain named civic, educational and charitable organizations, including the Veterans of Foreign Wars, and further provides that 'nothing contained herein shall be construed to prohibit any municipality from exercising its police powers to regulate boxing and wrestling exhibitions held under the auspices of the above named organizations.'

We remanded this case for a factual determination of 'whether the fight actually was held by and under the auspices of one of the approved groups.' 367 F. 2d at 303. The District Court held that it was so held, finding specifically 'that the municipality of Miami Beach exercised its police power in regulating this match and it was held under the auspices of the VFW Post No. 3559.'. We do not agree, as the evidence is overwhelming to the contrary, and the Trial Judge's ruling is clearly erroneous. Fed. R. Civ. P. Rule 52(a).

* * *

"The evidence is quite clear that the VFW had nothing whatsoever to do with holding, staging or conducting the contest and that the parties to the contract were well aware of that fact. Harold Conrad, a writer and fight promoter, who was public

relations director for plaintiff, Inter-Continental, and also on-the-scene agent for Inter-Continental preliminary to the fight actually taking place, acknowledged in effect that the $500 paid to the VFW was a mere gratuity.

* * *

". . . The conclusion is inescapable that the Liston-Clay fight was not held under the auspices of the VFW. The use of the organization's name was a mere fiction to avoid the prohibitory Florida statute, and representation on the printed tickets of VFW sponorship was an obvious subterfuge designed to present a nominal compliance with the Florida law."

2. That the decision adheres to, applies and follows settled precedent in Florida, as required in a diversity of citizenship action under the governing doctrine established in Erie R. Co. v. Tompkins, supra. The Petitioner had contended that the Respondents were estopped from asserting illegality as a defense because MacDONALD had the obligation of conducting a lawful fight under the contract. In disposing of that issue, the United States Court of Appeals for the Fifth Circuit followed Florida law and held the following:

"A second issue before us is the finding by the District Court that inasmuch as MacDonald had the obligation of conducting a lawful fight under the contract, defendants were estopped from asserting noncompliance with the exclusion clause of Florida Statutes Annotated § 548.03.

The law of Florida is to the contrary. The Supreme Court of Florida, in *Montsdoca v. Highlands Bank & Trust Co.*, 1923, 95 So. 666, 668, said: 'The doctrines of estoppel and waiver do not in general apply in transactions that are forbidden by statute or that are contrary to public policy.' We cited *Montsdoca* and used the quoted language with ap-

proval in *Northwestern National Casualty Company* v. *McNulty*, 5 Cir., 1962, 307 F. 2d 432, 442-443. See also *State* v. *City of Hialeah*, Fla. App. 1963, 156 So. 2d 675, 676, reiterating the non-applicability of the doctrine of estoppel to transactions either forbidden by statute or contrary to public policy. The rule applies regardless of whether the party asserting the invalidity of the contract is himself a participant in the wrongdoing. In *Local No. 234, Etc.* v. *Henley & Beckwith, Inc.*, Fla., 1953, 66 So. 2d 818, 823, the Supreme Court of Florida said:

> 'The cases are legion that a contract against public policy may not be made the basis of any action either in law or in equity. . . .
>
> 'Agreements in violation of public policy are void because they have no legal sanction and establish no legitimate bond between the parties. Brumby v. City of Clearwater, supra. *Because of this the defendant may assert the invalidity of the contract even though he is a participator in the wrong.* This is so for the reason that one who has entered into a contract or undertaking which is violative of public policy owes to the public the continuing duty of withdrawing from such an agreement.' (Emphasis supplied.)

It has also been said that the illegality of a contract as a defense is allowed not to protect the defendant but as a disability to the plaintiff. *National Transformer Corp.* v. *France Mfg. Co.*, 6 Cir., 1954, 215 F. 2d 343, 361; *Roberts* v. *Criss*, 2 Cir., 1920, 266 F. 296. The evidence shows that the parties, pursuant to their contract, accomplished an unlawful purpose by virtue of an apparent subterfuge. Under the circumstances, the law will leave the parties where it finds them, and no relief shall be granted because of the dominant public interest. See *National Transformer Corp.* v. *France Mfg. Co.*, supra at 361. Cf. *Twin City Pipe Line Co.* v. *Harding Glass*

Co., 283 U.S. 353, 357, 51 S. Ct. 476, 477; *Steele* v. *Drummond*, 275 U.S. 199, 207, 48 S. Ct. 53, 55 (1927)."

It is significant to note that the case quoted from at length on the second appeal, namely, *Local No. 234, Etc.* v. *Henley & Beckwith, Inc.*, 66 So. 2d 818 (1953, Fla.), was one of the Florida Supreme Court decisions relied upon by the appellate court on the first appeal in holding that "(T)here is no doubt that a contract to perform an illegal act is void and will not be enforced in Florida courts".

3. That there is no underlying Federal question or constitutional issue, the decision of which would be obviated by application, at this stage of this litigation, of the Federal doctrine of abstention.

4. That there is no Florida statute or part thereof that has been invalidated by the decision sought to be reviewed.

QUESTION PRESENTED

Petitioner, in the "Questions Involved" section of its petition (pages 3-4), has predicated the issues presented on the following erroneous conclusions:

1. That the United States Court of Appeals for the Fifth Circuit on the second appeal, initially considered and interpreted a state statute of Florida, and by such consideration and interpretation rendered portions of the statute invalid.

2. That the decision of the United States Court of Appeals for the Fifth Circuit on the second appeal, overruled its prior decision on the same point of law.

Indulgence in these mistaken conclusions, as the basis for the presentation of the issues, in effect sets up a straw-man that does not exist for the Petitioner to knock down. That stratagem makes it impossible for the Respondents to

accept the Petitioner's statement of the question presented. The Respondents respectfully suggest that the issue may be accurately stated, in accordance with the record, as follows:

> WHETHER OR NOT A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW A DECISION OF A UNITED STATES COURT OF APPEALS, ON THE SECOND APPEARANCE OF THAT CAUSE IN THE APPELLATE COURT, UNDER THE FEDERAL DOCTRINE OF ABSTENTION, WHERE THE SUPREME COURT OF THE UNITED STATES HAD PREVIOUSLY, ON PETITION FOR A WRIT OF CERTIORARI DIRECTED TO THE FIRST APPELLATE DECISION, DECLINED TO APPLY THE ABSTENTION DOCTRINE TO THIS LITIGATION; AND WHERE, ON THE SECOND APPEAL, THE UNITED STATES COURT OF APPEALS ADHERED TO ITS PRIOR DECISION, WITHOUT INITIALLY CONSTRUING, INTERPRETING OR INVALIDATING ANY STATE STATUTE OR PART THEREOF, AND APPLIED STATE LAW THAT WAS NOT UNCERTAIN, IN A DIVERSITY OF CITIZENSHIP ACTION, TO THE FACTS OF THE CASE AND HELD THAT THE TRIAL COURT ERRED IN FACTUALLY DECIDING THE SPECIFIC ISSUE OF FACT, FOR THE TRIAL OF WHICH THE CAUSE HAD BEEN REMANDED ON THE FIRST APPEAL?

ARGUMENT

A Writ of Certiorari Should Not Issue to Review a Decision of a United States Court of Appeals, on the Second Appearance of That Cause in the Appellate Court, under the Federal Doctrine of Abstention, Where the Supreme Court of the United States Had Previously, on Petition for a Writ of Certiorari Directed to the First Appellate Decision, Declined to Apply the Abstention Doctrine to This Litigation; and Where, on the Second Appeal, the United States Court of Appeals Adhered to Its Prior Decision, Without Initially Construing, Interpreting or Invalidating Any State Statute or Part Thereof, and Applied State Law That Was Not Uncertain, in a Diversity of Citizenship Action, to the Facts of the Case and Held That the Trial Court Erred in Factually Deciding the Specific Issue of Fact, for the Trial of Which the Cause Had Been Remanded on the First Appeal.

The Federal doctrine of abstention appears to have had its origin in the case of *Railroad Commission of Texas* v. *Pullman Co.*, 312 US 496, 61 S.Ct. 643. It was decided in that case that in the exercise of a "wise discretion", Federal courts could restrain or defer the exercise of their jurisdiction in order to obtain a state court determination of state law that would avoid the necessity of deciding an underlying Federal or constitutional issue. That case involved a state question of the power of the Texas Railroad Commission to promulgate a particular order. The order raised serious questions of Federal constitutional law involving discrimination against Negroes. Deferring to state court adjudication in the optimism of avoiding the grave underlying Federal constitutional question, it was held as follows (61 S.Ct. at 645):

> ". . . If there was no warrant in state law for the Commission's assumption of authority there is an end of the litigation; the constitutional issue does not arise. . . ."

Hence the underlying purpose in the very origin of the abstention doctrine was to withhold Federal court jurisdiction where a state law issue existed and could be decided by the state courts, which would eliminate the necessity of the Federal courts deciding a Federal constitutional issue. In numerous subsequent decisions it has been held that the abstention doctrine is inapplicable to instances of properly invoked Federal court jurisdiction involving the application of state statutes. Or, in other words, the Federal judiciary will not renounce its jurisdiction in deference to the state courts to apply clear and unambiguous state statutes. *City of Chicago* v. *Atchison, T. & S.F. Ry. Co.*, 357 US 77, 78 S.Ct. 1063; *Davis* v. *Mann*, 377 US 678, 84 S.Ct. 1441; *Harman* v. *Forssenius*, 380 US 528, 85 S.Ct. 1177; and *Zwickler* v. *Koota*, 389 US 241, 88 S.Ct. 391. In *City of Chicago*, it was held (78 S.Ct. 1067):

> "After full argument on that point, both the District Court and a unanimous Court of Appeals held that § 28-31.1 applied to Transfer. That was the position of the city in both courts and it made no move there to have the matter remitted to the state courts. After referring to the provisions of § 28-31.1 the City declared in its brief in the Court of Appeals: 'A more accurate description of the business engaged in by Transfer would be hard to find.' We think this is a fair summarization. We see no ambiguity in the section which calls for interpretation by the state courts. Cf. Toomer v. Witsell, 334 US 385, 68 S.Ct. 1156, 92 L.Ed. 1460. Remission to those courts would involve substantial delay and expense, and the chance of a result different from that reached below, on the issue of applicability, would appear to be slight."

In *Davis* v. *Mann*, the pertinent language of the decision reads thusly (84 S.Ct. 1447):

> "Appellants' contention that the court below should have abstained so as to permit a state court to decide

> the questions of state law involved in this litigation is without merit. Where a federal court's jurisdiction is properly invoked, and the relevant state constitutional and statutory provisions are plain and unambiguous, there is no necessity for the federal court to abstain pending determination of the state law questions in a state court. McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed. 2d 622. This is especially so where, as here, no state proceeding had been instituted or was pending when the District Court's jurisdiction was invoked. We conclude that the court below did not err in refusing to dismiss the proceeding or stay its action pending recourse to the state courts."

In *Harman* v. *Forssenius, supra,* the following was held (85 S.Ct. at 1182):

> ". . . If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, it is the duty of the federal court to exercise its properly invoked jurisdiction. . . ."

The United States Supreme Court has treated the abstention doctrine as it applies to diversity of citizenship cases and has held that its application in such matters would literally destroy diversity jurisdiction in the Federal courts. In *Meredith* v. *City of Winter Haven,* 320 US 228, 64 S.Ct. 7, a diversity of citizenship action was brought in the United States District Court for the Southern Division of Florida, seeking a declaratory judgment and injunctive relief in regard to certain revenue bonds issued by the City of Winterhaven, Florida. The complaint was dismissed for failure to state a cause of action, but on appeal, the United States Court of Appeals reversed, with directions to dismiss the cause without prejudice to the Plaintiff's right to proceed in the state courts. The Plaintiff filed

a petition for a writ of certiorari, which the United States Supreme Court granted, holding that regardless of the difficulties or uncertainties of state law, the petitioner-plaintiff had a right to have his diversity of citizenship action decided by the Federal courts as the forum of the plaintiff's choice. Deciding that but for exceptional circumstances the abstention doctrine was inapplicable in diversity of citizenship cases, and that it was the duty of the Federal courts to decide in such cases state law questions even though the state law was difficult to ascertain and even uncertain, the United States Supreme Court stated the following:

(64 S.Ct. at 11)

". . . But we are of opinion that the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision.

The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. Commonwealth T. Co. v. Bradford, 297 U.S. 613, 618, 56 S.Ct. 600, 601, 80 L.Ed. 920; Risty v. Chicago, R.I. & P.R. Co., 270 U.S. 378, 387, 46 S.Ct. 236, 240, 70 L.Ed. 641; Kline v. Burke Const. Co., 260 U.S. 226, 234, 235, 43 S.Ct. 79, 82, 83, 67 L.Ed. 226, 24 A.L.R. 1077; McClellan v. Carland, 217

U.S. 268, 281, 282, 30 S.Ct. 501, 504, 505, 54 L.Ed. 762. When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act."

(64 S.Ct. at 12)

". . . Congress having adopted the policy of opening the federal courts to suitors in all diversity cases involving the jurisdictional amount, we can discern in its action no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine. The decision of this case is concerned solely with the extent of the liability of the city on its Refunding Bonds. Decision here does not require the federal court to determine or shape state policy governing administrative agencies. It entails no interference with such agencies or with the state courts. No litigation is pending in the state courts in which the question here presented could be decided. We are pointed to no public policy or interest which would be served by withholding from petitioners the benefit of the jurisdiction which Congress has created with the purpose that it should be availed of and exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess. To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it."

Referring to the *Meredith* case, *supra*, the United States Supreme Court, in *Propper* v. *Clark*, 337 US 472, 69 S.Ct. 1333, 1343, commented as follows:

". . . We have refused in a diversity of citizenship case to allow the difficulty of an issue of state law to deter us from exercising our jurisdiction when federal determination was subject to equitable discretion and the state issue was the only one in the case. Meredith v. Winter Haven, 320 U.S. 228, 64 S.Ct. 7, 88 L.Ed. 9. To refrain from deciding it, we there said, would be to enervate diversity jurisdiction."

The abstention doctrine was recently summarized in *Reetz* v. *Bozanich*, 397 US 82, 90 S.Ct. 788, 790, as follows:

"It is, of course, true that abstention is not necessary when a federal court is faced with a question of local law, the classic case being Meredith v. City of Winter Haven, 320 U.S. 228, 64 S.Ct. 7, 88 L.Ed. 9, where federal jurisdiction was based on diversity only. Abstention clearly involves duplication of effort and expense and an attendant delay. See England v. Louisiana State Board, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed. 2d 440. That is why we have said that this judicially created rule which stems from Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971, should be applied only where 'the issue of state law is uncertain.' Harman v. Forssenius, 380 U.S. 528, 534, 85 S.Ct. 1177, 1182, 14 L.Ed. 2d 50. Moreover, we said in Zwickler v. Koota, 389 U.S. 241, 248, 88 S.Ct. 391, 395, 19 L.Ed. 2d 444, that abstention was applicable 'only in narrowly limited "special circumstances."' 'citing Propper v. Clark, 337 U.S. 472, 492, 69 S.Ct. 1333, 1344, 93 L.Ed. 1480. In *Zwickler*, a state statute was attacked on the ground that on its face it was repugnant to the First Amendment; and it was conceded that state court construction could not render unnecessary a decision of the First Amendment question. 389 U.S., at 250, 88 S.Ct., at 396. A state court decision here, however, could conceivably avoid any decision under the Fourteenth Amendment and would avoid any possible irritant in the federal-state-relationship.

> The *Pullman* doctrine was based on 'the avoidance of needless friction' between federal pronouncements and state policies. 312 U.S., at 500, 61 S.Ct. at 645. The instant case is the classic case in that tradition, for here the nub of the whole controversy may be the state constitution. . . ."

The Petitioner's attempted invocation of the abstention doctrine in the case at bar is wholly inappropriate. It was the Petitioner who instituted this case as a diversity of citizenship action for alleged breach of contract in the United States District Court in and for the Southern District of Florida, Miami Division. After having selected the Federal court as the forum to hear its case, the Petitioner, after two (2) rounds of appellate proceedings, now being dissatisfied with the result, urges this Court to apply the abstention doctrine and have the Federal courts renounce jurisdiction that the Petitioner invoked, where there is no underlying Federal question or constitutional law issue that will be avoided by any such effort. It was also the Petitioner that took the position, when it was respondent on the first appearance of this case in the United States Supreme Court, that the abstention doctrine was inapplicable. The Respondents have contended throughout that Florida Statutes, Chapter 548.01, is a clear and unambiguous declaration of the public policy of the State of Florida, condemning as a felony public displays of pugilism for reward, except when "held by and under the auspices of" one of the named organizations contained in Florida Statutes, Chapter 548.03. The contract between the parties calls for the holding of a public display of pugilism for reward denounced by the Florida Statutes. The Respondents also contended that if by some stretch of imagination it could be considered that the contract between the parties to this litigation somehow fell within the purview of the amendatory provisions of Florida Statutes, Chapter 548.03, exempting certain named groups from

the prohibitory provisions of Florida Statutes, Chapter 548.01, that exempted class constituted a denial of equal protection of the laws. *Morey* v. *Doud,* 354 US 457, 77 S.Ct. 1344; *Smith* v. *Cahoon,* 283 US 553, 51 S.Ct. 582; *Levy* v. *Louisiana,* 391 US 68, 88 S.Ct. 1509; and *Mayhue* v. *City of Plantation, Florida,* 375 F. 2d 447 (5th Cir., 1967). Consequently, after the first decision rendered by the United States Court of Appeals for the Fifth Circuit, a petition for certiorari was filed in the Supreme Court of the United States, requesting the invocation of the abstention doctrine so that the state courts could decide if the contract on its face violated the applicable statutes in order to avoid the potential underlying constitutional question. It was the Petitioner in this cause, who was then respondent, that contended that the abstention doctrine was inapplicable, and the United States Supreme Court denied issuance of a writ of certiorari. *The Miami Beach First National Bank, et al.* v. *Inter-Continental Promotions, Inc.,* 393 US 834, 89 S.Ct. 105 (case No. 3).

The decision now sought to be reviewed is one based wholly on facts adduced at the trial which demonstrated overwhelmingly that the public display of pugilism for reward condemned by Florida Statutes, Chapter 548.01, was not "held by and under the auspices of" any of the exempt organizations named in the amendatory provision of Florida Statutes, Chapter 548.03. Invocation of the abstention doctrine at this juncture would have the complete reverse effect of the purpose for which that doctrine was initially established in *Railroad Commission of Texas* v. *Pullman Co., supra*; because if the case were to be referred to the state courts for determination and it was decided factually that the fight was held by and under the auspices of one of the exempt groups named in Florida Statutes, Chapter 548.03, that would revive rather than avoid a determination of the constitutional question of

whether or not a state can condemn certain acts as a felony as to all others and exempt certain named groups from the prohibitions and penalties of the act itself.

On the first appeal, the case was remanded to the lower court for a trial of the specific factual question "of whether the fight actually was held by and under the auspices of one of the approved groups". (*Inter-Continental Promotions, Inc.* v. *MacDonald,* 367 F. 2d 293, 303) Trial was had, and the lower court found that "there is testimony which indicates that the fight was held under the auspices of the VFW, *but not by the VFW*". (Emphasis supplied) On the second appeal, the United States Court of Appeals, adhering to its prior decision, held that the trial court erroneously decided the factual issue, in that, the subject public display of pugilism for reward was not actually "held by and under the auspices of" the VFW, and that, therefore, the parties, pursuant to their contract, "accomplished an unlawful purpose". In rendering that decision, which is sought to be reviewed, the appellate court applied Florida law to the unambiguous provisions of Florida Statutes, Chapter 548. As stated, Florida Statutes, Chapter 548, in clear and unambiguous language, condemns, by virtue of Section 548.01, public displays of pugilism for reward as a felony, and in Section 548.03 exempts such displays when "held by and under the auspices of" one of the named organizations, and further provides for municipal police regulation when exempted, permissible prize fights are held within the territorial limits of a municipality. Clearly, when a public display of pugilism for reward is conducted in Florida and held by and under the auspices of one of the exempt organizations, if it is held within the territorial limits of a municipality, that city can exercise its police powers to regulate seating, crowd capacity, the requisite number of fire exits,

and the like, in order to preserve and protect the health, welfare and safety of the public.

Under Florida law, a contract is unquestionably illegal and unenforceable when it appears from the contract or from its operation or results, that in its terms or in its full operation it is unlawful or its operation accomplishes or tends to accomplish an unlawful purpose, whether so intended by the parties or not, because the law, through the judiciary, will not lend its support to a claim that is founded on its own violation. See: *Stewart* v. *Stearns & Culver Lumber Co.*, (1908) 56 Fla. 570, 48 So. 19, 24 LRA NS 649; *Escambia Land & Mfg. Co.* v. *Ferry Pass Inspectors & Shippers Asso.*, (1910) 59 Fla. 239, 52 So. 715, 138 Am. St. Rep. 121; *Citizens' Bank & Trust Co.* v. *Mabry*, (1931) 102 Fla. 1084, 136 So. 714; *Local 234, U.A.J.A.* v. *Henley & Beckwith, Inc.*, (1953, Fla.) 66 So. 2d 818; *Schaal* v. *Race*, 135 So. 2d 252 (Fla. App. 2d, 1961); and *Gonzalez* v. *Trujillo*, 179 So. 2d 896 (Fla. App. 3rd, 1965). In the *Stewart* case, *supra*, the Florida Supreme Court held:

(48 So. at 25)

". . . Until the contrary appears, it is assumed that a contract is made for and will accomplish only a lawful purpose; and no strained or unusual construction should be given to a contract so as to render it unlawful. But when it appears from a contract and the circumstances under which it was made, and from its purposes, operation, and results, that in its terms or in its full operation it is unlawful, or its operation accomplishes or in reality tends to accomplish an unlawful purpose, whether so intended by the parties thereto or not, the contract will not be enforced by the courts."

(48 So. at 26)

"The illegality in the agreement or in its operation need not amount to a criminal offense. The test is whether the agreement in full operation will be injurious to the public welfare. If so, it will not be enforced."

In the *Citizens' Bank & Trust Co.* case, *supra*, the Florida Supreme Court held (136 So. at 717):

"We must therefore hold that Citizens' Bank & Trust Company not only had no authority to acquire the capital stock of another bank, but its act in doing so was in direct violation of law; all of such stock having been acquired subsequent to the Act of 1917. Not only was the act in violation of law, but it was condemned by statute as a crime, and of this the Franklin Bank is charged with full and complete knowledge.

The next question to be determined is whether or not, when the act of Citizens' Bank & Trust Company in acquiring the stock was ultra vires, the bank can now be held to pay the amount of the assessment based on the ownership of that stock.

In Lassiter & Co. v. Taylor, 99 Fla. 819, 128 So. 14, 19, 69 A.L.R. 689, in an opinion written by Mr. Commissioner Davis, this court said, quoting with approval from Berka v. Woodward, 125 Cal. 119, 57 P. 777, 45 L.R.A. 420, 73 Am. St. Rep. 31:

'This, then, is the undoubted rule, that, when a contract is expressly prohibited by law, no court of justice will entertain an action upon it, or upon any asserted rights growing out of it. And the reason is apparent; for to permit this would be for the law to aid in its own undoing. Says the Supreme Court of the United States in President, etc. v. Owens, 2 Pet. 527 (7 L.Ed. 508): "No court of justice can, in its nature, be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of

the country. How can they become auxiliary to the consummation of violations of law? There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal." And again the same august tribunal, in Coppell v. Hall, 7 Wall. 542 (19 L.Ed. 244), says:

> "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reasons.
>
> Where the contamination reaches it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded on its own violation.'"

In *Schaal* v. *Race*, *supra*, the Florida appellate court, quoting from Professor Pomeroy's treatise on Specific Performance of Contracts, held as follows (135 So. 2d at 257):

> "Then at page 651, § 286, Defense of Illegality Rests Upon Reasons of Public Policy, it is stated:
>
> 'As has already been stated, courts set aside or refuse to enforce illegal contracts, in general, not from any regard for the objecting party, nor from a desire to protect *his* individual interests, but from reasons of public policy. Where two persons with equal knowledge and equally participating in the fault, have entered into an illegal agreement, and one of them has obtained by the other's voluntary act all the benefit of it for himself, his refusal to perform on his own part is, generally considered in itself alone, unjust and inequitable; but the law sustains him in this position, because it takes into account the interest of society and of the state, which demand the complete suppression of such

> agreements. The objection which prevails and avoids the illegal contract comes not from the individual litigant, but from the public at large who speak through the courts. Whenever, therefore, in a suit for specific performance, the illegality, not having been alleged in the pleadings, is disclosed, for the first time by the evidence, the court will on its own motion pursue the investigation, and, if the fact is established refuse to enforce the agreement. * * *'"

Moreover, in *Local 234, etc.* v. *Henley & Beckwith, Inc., supra,* the Supreme Court of Florida, as quoted in the decision sought to be reviewed, held the following (66 So. 2d at 823):

> "The cases are legion that a contract against public policy may not be made the basis of any action either in law or in equity. . .
>
> "Agreements in violation of public policy are void because they have no legal sanction and establish no legitimate bond between the parties. Brumby v. City of Clearwater, supra. *Because of this the defendant may assert the invalidity of the contract even though he is a participator in the wrong.* This is so for the reason that one who has entered into a contract or undertaking which is violative of public policy owes to the public the continuing duty of withdrawing from such an agreement." (Emphasis supplied)

It is readily apparent that under the law of Florida, it is the public interest that the courts protect in sustaining the defense of illegality to a suit brought for the alleged breach of contract. The public interest in the instant case was expressed by the Legislature of the State of Florida in Florida Statutes, Chapter 548, condemning as a felony public displays of pugilism for reward. The contract between the parties unquestionably resulted in the public

being subjected to a public display of pugilism for reward. The amendatory provisions contained in Florida Statutes, Chapter 548.03, permitting public displays of pugilism for reward if, and only if, "held by and under the auspices of" one of the named exempt organizations, was factually not complied with because the subject prize fight was not held by and under the auspices of any exempt organization. The focus of concern, based on Florida precedent, in upholding the defense of illegality is to discourage contracts of the kind involved in this litigation which subject the public to the very type of display of pugilism for reward condemned by the Legislature of the State of Florida. The illegality contaminates, as demonstrated, everything that it touches. The law of Florida denounces as void any contract calling for the performance of an act where a statute pronounces a penalty for that act. The obligation under the contract between the parties in this case specifically called for the performance of acts by MacDONALD in which the statutes of the State of Florida impose a penalty if performed by anyone other than the organizations named in the amendatory provisions of Section 548.03. Neither MacDONALD nor the Petitioner is one of the entities named in the statute; consequently, their contract under the law of Florida was void. The fact that the party asserting the illegality is guilty of performing the illegal act, pursuant to his contractual obligation, does not preclude the defense. In the *Citizens' Bank & Trust Co.* case, *supra*, the bank illegally purchased stock in another bank, but the Florida Supreme Court nevertheless permitted the bank to assert illegality as a defense. Moreover, as the United States Court of Appeals for the Fifth Circuit pointed out in the decision sought to be reviewed, under Florida law "(t)he doctrines of estoppel and waiver do not in general apply in transactions that are forbidden by statute or that are contrary to

public policy." *Montsdoca* v. *Highlands Bank & Trust Co.*, 85 Fla. 158, 95 So. 666, 668. In the case sub judice there was no reasonable debate that there was an unlawful public display of pugilism for reward perpetrated on the public through the performance of the contract between the parties. Consequently, in the decision sought to be reviewed, the United States Court of Appeals for the Fifth Circuit concluded its decision by holding thusly:

> ". . . Under the circumstances, the law will leave the parties where it finds them, and no relief shall be granted because of the dominant public interest. . . ."

Hence, it is apparent that the decision sought to be reviewed in no way calls for the application of the abstention doctrine. The decision follows Florida law in a diversity of citizenship action arising out of the United States District Court in and for the Southern District of Florida, Miami Division, the jurisdiction of which was activated by the Petitioner. There are no ambiguous statutes involved that were interpreted, construed or invalidated by the decision under scrutiny. Furthermore, there is no outstanding Federal question or issue of constitutional law extant in this litigation, much less one that can be avoided by deferring Federal jurisdiction to state court jurisdiction. In fact, the reverse could have been the case had it not been decided factually as the decision was rendered.

Before closing, Respondents are constrained to point out, despite the Petitioner's contention being factually incorrect, that the decision sought to be reviewed conflicts with the decision rendered on the first appeal, that under Florida law the appellate court sitting in a diversity of citizenship action could have altered, varied or reversed its prior decision. As heretofore stated, all that was done on the second appeal was follow the first appeal by holding that the trial court was in error on the factual con-

clusion reached on the issue of fact for the trial of which the cause had been previously remanded. In Florida, the doctrine of the law of the case is not absolute, and the Florida appellate courts have held that errors made on a first appeal can be corrected on a second review. *Beverly Beach Properties* v. *Nelson*, 68 So. 2d 605 (1963, Fla.) and *Hendrick* v. *Strazzula*, 168 So. 2d 156 (Fla. App. 2d, 1964). In the last cited authority, the District Court of Appeal in and for the Second District of Florida, relying upon the Florida Supreme Court decision in *Beverly Beach Properties, supra*, held as follows (168 So. 2d at 161):

> "Finally, it is contended by the defendants that in this court's decision on the former appeal we held adversely to the plaintiff on the question here presented, and it is argued that the decision there became the 'law of the case.' With this contention we cannot agree. The facts and circumstances on this appeal are materially different from those on the former appeal; but even if we now should find that we were in error on that point of the case, we have the power to correct it. In Beverly Beach Properties v. Nelson, Fla. 1954, 68 So. 2d 604, 607, 41 A.L.R. 2d 1071, Justice Hobson speaking for the Court said:
>
> > 'This is the same suit and we have not lost jurisdiction thereof. Consequently, we have the power to correct any error which the Chancellor *or we* may have heretofore made in the progress of this litigation. * * *' (Emphasis added)"

Hence, it is apparent that the Petitioner's contention is both legally and factually incorrect. It is factually incorrect because on the second appeal the appellate court followed its prior decision and held that the trial court incorrectly decided the factual issue for the trial of which the cause was remanded. Legally the Petitioner is incorrect because even had the appellate court overruled its prior decision in the

same case, on the same point of law, that judicial power was vested in the appellate court, pursuant to Florida law, which must be applied in this diversity action under *Erie R. Co.* v. *Tompkins, supra.* Consequently, the assertion by the Petitioner that the second decision constitutes an overruling of the first decision, and that doing so was "a departure from the accepted and usual course of judicial proceedings to such an extent as to warrant the exercise by this Court of its supervisory powers"; is both inaccurate and incorrect.

CONCLUSION

The petition for a writ of certiorari filed in this cause should be denied. The Petitioner's attempt to invoke the abstention doctrine is wholly inappropriate. Acceptance of the Petitioner's position in that respect would mark the expansion of the abstention doctrine to the point where Federal diversity of citizenship jurisdiction would be totally eviscerated. It would mean that a plaintiff could select the Federal court as the forum in which to litigate its diversity of citizenship action, and then after losing the case on the facts turn around and demand the withholding of the jurisdiction that it invoked in order to re-litigate the case that it lost. The only policy that such a proposition could conceivably foster would be interminable delay and expense, contrary to all reasonably recognized principles encouraging the fair, efficient, expeditious, inexpensive termination of litigation at its earliest possible point.

The petition should similarly be denied on the only other ground asserted by the Petitioner, namely, that the decision sought to be reviewed, constituting the second appearance of this cause in the United States Court of Appeals for the Fifth Circuit, was an overruling of the earlier decision which amounted to a departure from the accepted

and usual course of judicial proceedings to such an extent warranting the exercise of the supervisory powers of the Supreme Court of the United States. That contention is incorrect, legally and factually—factually, because the first decision was not overruled but followed, in that, the cause was initially remanded to the trial court to try the factual question of whether or not the subject public display of pugilism for reward was actually held by and under the auspices of one of the exempted groups named in Florida Statutes, Chapter 548.03, and the appellate court decided that the trial court was in error because "the evidence is overwhelming to the contrary"; and legally because, in this diversity of citizenship action, the Federal court, pursuant to *Erie R. Co.* v. *Tompkins, supra,* must apply Florida law, and under Florida law the doctrine of the law of the case is not absolute, and the appellate court on a second review had the authority to overrule its earlier decision.

For the reasons stated in this brief, it is respectfully requested that the petition for certiorari be denied.

Respectfully submitted,

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Marion E. Sibley

.....
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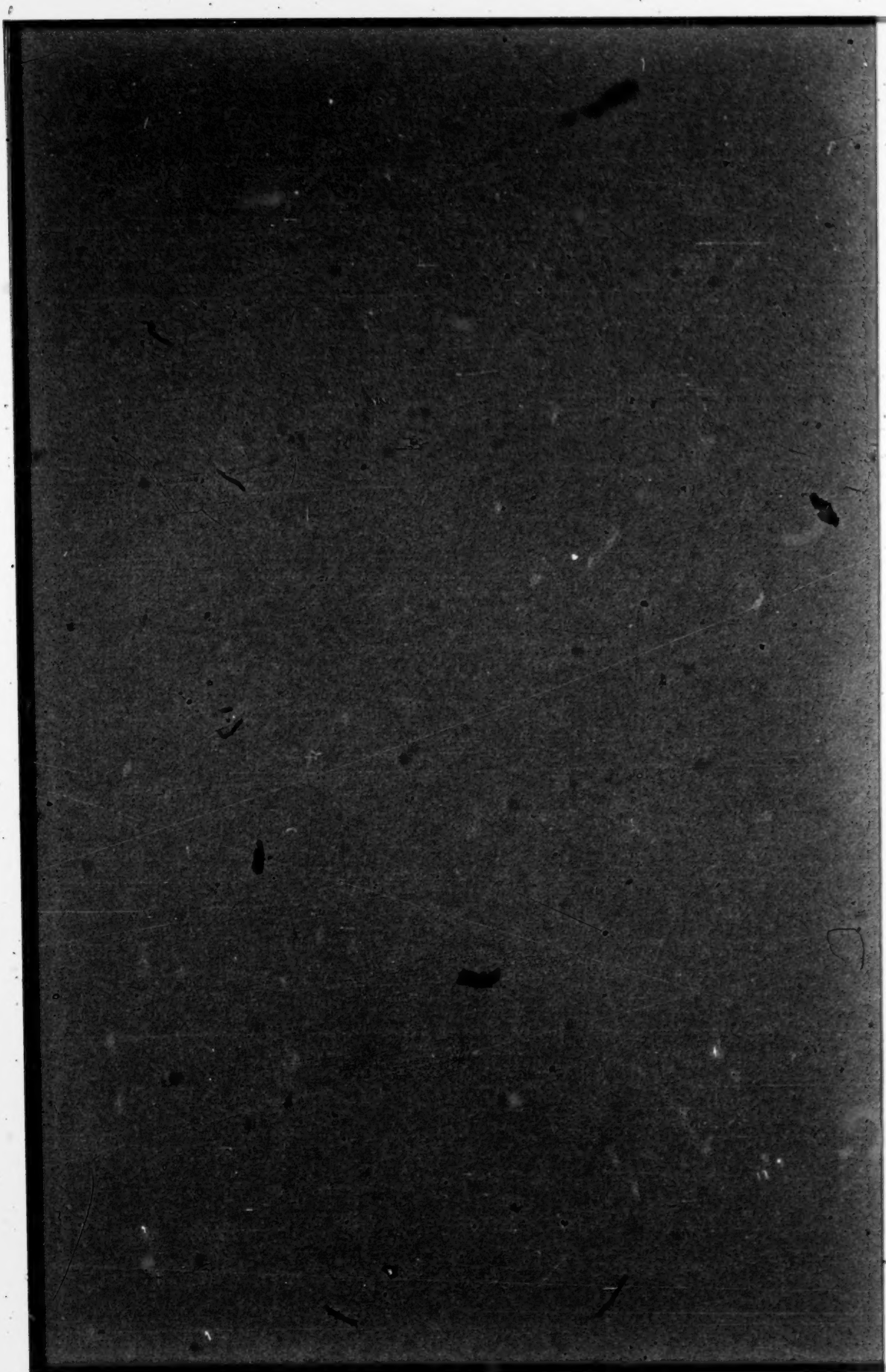
CERTIFICATE OF SERVICE

The undersigned certifies that three (3) true and correct copies of the above and foregoing "Respondents' Brief in Opposition to Petition for Writ of Certiorari" were furnished by mail to HANSFORD H. TYLER, JR. and DAVID D. PHILLIPS, HORTON & SCHWARTZ, and MURRAY SAMS, Attorneys for Petitioner, 410 Concord Building, Miami, Florida 33130, by depositing the same in a United States mail box with first class postage prepaid affixed, on this the 28th day of July, 1971.

.....

Irving B. Levenson



A1

CHAPTER 548

Pugilistic Exhibitions

548.01 Prize fighting, pugilistic exhibitions; penalty. —Any person who shall voluntarily engage in any pugilistic exhibition, fight or encounter, with or without gloves, between man and man, or in an exhibition or fight between man and bull, or between man and any other animal, for money or anything of value, or upon the result of which any money or anything of value is to be collected, acquired, bet or wagered, or to see which any admission fee is charged, directly or indirectly, shall be punished by a fine of not less than two thousand five hundred, nor more than five thousand dollars, or by imprisonment for not more than five years.

History.—§1, ch. 4402, 1895; GS 3253; RGS 5084; CGL 7186.

cf.—§775.06, Alternative punishment.

548.02 Second, stakeholder, etc.; penalty.—

(1) Any person who shall act as second, stakeholder, counselor or advisor, or who shall render aid of any such character, for or to the principal or either of them in such exhibition, encounter, or fight shall be deemed a principal in the offense, and shall be punished as prescribed in §548.01.

(2) The sheriff or his deputies, in any county where there is cause to believe that such an encounter or contest is about to occur, shall enter any house or enclosure, or any other place, and arrest, without warrant, any party engaged or about to engage in such contest.

History.—§2, ch. 4402, 1895; GS 3254; RGS 5085; CGL 7187.

548.03 Pugilistic exhibition defined.—By the term "Pugilistic exhibition, encounter or fight, with or without gloves," as used in this chapter, is meant any voluntary fight or personal encounter, by blows, between two or more persons, for money, prize of any character, points, distinction or fame, or other thing of value, or upon the results of which any money or thing of value is bet or wagered, or for which an admission fee is charged, directly or indirectly; provided, that nothing contained herein or in any law or municipal regulation shall be construed as applying to boxing exhibitions held by and under the auspices of the American legion, disabled American veterans, veterans of foreign wars of the United States, Spanish-American war veterans, or companies or detachments of the Florida national guard, Y. M. C. A., junior chamber of commerce, or any college which is a member of any recognized amateur athletic association and the Circulo Cubana club, a charitable organization now in existence, whether an admission fee is charged or not; provided further, that nothing contained herein shall be construed to prohibit any municipality from exercising its police powers to regulate boxing and wrestling exhibitions held under the auspices of the above named organizations.

History.—§3. ch. 4402, 1895; GS 3255; RGS 5086; §1, ch. 12213, 1927; CGL 7188; §1, ch. 14831, 1931; §1, ch. 17179, 1935; §1, ch. 26729, 1951; §1, ch. 57-782.

548.04 Physician.—At any boxing, sparring or wrestling match or exhibition permitted under §548.03 there shall be in attendance a duly licensed physician, whose duty it shall be to observe the physical condition of the boxers or wrestlers and advise the referee or judges with regard thereto; any competent physician who has not had less than three years experience as a practitioner may be

licensed. No boxer or wrestler shall be permitted to enter the ring unless, not more than three hours before, a physician shall certify in writing that the boxer or wrestler is physically fit to engage in the proposed contest. The physician's fee shall be paid by the licensee conducting the match or exhibition.

History.—§1, ch. 57-154.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29404

INTER-CONTINENTAL PROMOTIONS, INC.,
Plaintiff-Appellee,

versus

THE MIAMI BEACH FIRST NATIONAL BANK and FRED R. BAISDEN, as Executors of the Last Will and Testamant of William B. MacDonald, Jr., deceased, Etc.,
Defendants-Appellants,

Appeals from the United States District Court for the Southern District of Florida

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(April 9, 1971)

Before GEWIN, COLEMAN and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge: This Florida diversity matter is before us a second time. On the first occasion we reversed the District Judge, who granted defendants' motion to dismiss for failure to state a claim, and remanded the case for trial on the merits. See *Inter-Continental Promotions, Inc. v. MacDonald,* 5 Cir., 1966, 367 F. 2d 293. Accordingly, a trial was held with a full development of the facts and circumstances of the case. This time the District Court (sitting without a jury) rendered judgment in favor of plaintiff.

This breach of contract action by Inter-Continental Promotions, Inc. against William B. MacDonald, Jr.[1] grows out of the world heavyweight championship fight between Charles "Sonny" Liston and Cassius Clay on February 25, 1964. Inter-Continental and MacDonald entered into a contract by which Inter-Continental agreed to produce Liston and Clay at the specified time and place in Miami Beach, Florida, where they would engage in the boxing contest.[2] In consideration of the payment of $625,000, payable upon the completion of the boxing contest, MacDonald was to receive the live gate proceeds. However, all ancillary rights, such as television, radio and movie rights, were retained by Inter-Continental. Under the contract MacDonald had "the right and obligation to promote said boxing contest in the manner he deems fit; to print and sell admission tickets thereto; to collect the proceeds of ticket sales; to arrange all seatings; to make whatever arrangements he deems necessary for the press; to pay all local, state, and federal taxes on admissions; to arrange and pay for the undercard preliminary fights; to pay all fees and expenses of the controlling boxing commission; to advertise and promote said live gate; to make press releases; and, to do any and all things of that kind and nature reasonably necessary for the enhancement of said live gate." Arrangements were duly made and on February 25, 1964, Clay knocked out Liston and won the heavyweight championship of the world. The gate receipts of

1. The complaint was originally brought against William B. MacDonald, Jr. and his surety, New Amsterdam Casualty Company. Upon the death of MacDonald, appellants, The Miami Beach First National Bank and Fred R. Baisden, as Executors of the Last Will and Testament of William B. MacDonald, Jr., were substituted in the place and stead of MacDonald and New Amsterdam Casualty Company.

2. William B. MacDonald, Jr. subsequently assigned to Dundee-MacDonald Enterprises, Inc. his rights and duties under the contract.

only $225,000, however, fell far short of MacDonald's expectations and the consideration he had agreed to pay for those rights. He turned over the gate receipts to Inter-Continental which then brought this suit for the balance.

Florida has declared a public policy forbidding the performance of prize fighting and pugilistic exhibitions for reward. This prohibition is contained in Florida Statutes Annotated § 548.01, a statute providing criminal penalties of a fine of not less than $2,500 nor more than $5,000, or imprisonment for not more than 5 years.[3] Section 548.03, however, excepts from the prohibition boxing exhibitions which are "held by and under the auspices of" certain named civic, educational and charitable organizations, including the Veterans of Foreign Wars, and further provides that "nothing contained herein shall be construed to prohibit any municipality from exercising its police powers to regulate boxing and wrestling exhibitions held under the auspices of the above named organizations."[4]

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3. This section reads as follows:

"548.01 Prize fighting, pugilistic exhibitions; penalty.—

"Any person who shall voluntarily engage in any pugilistic exhibition, fight or encounter, with or without gloves, between man and man, or in an exhibition or fight between man and bull, or between man and any other animal, for money or anything of value, or upon the result of which any money or anything of value is to be collected, acquired, bet or wagered, to see which any admission fee is charged, directly or indirectly, shall be punished by a fine of not less than two thousand five hundred, nor more than five thousand dollars, or by imprisonment for not more than five years."

4. This section reads as follows:

"548.03 Pugilistic exhibition defined.—

"By the term 'Pugilistic exhibition, encounter or fight, with or without gloves,' as used in this chapter, is meant any voluntary fight or personal encounter, by blows, between two or more persons, for money, prize of any character, points, distinction or fame, or other thing of value, or upon the results of which any money or thing of value is bet or wagered, or for which an admission fee is charged, directly or indirectly; provided, that nothing contained herein or in any law or munici-

We remanded this case for a factual determination of "whether the fight actually was held by and under the auspices of one of the approved groups." 367 F. 2d at 303. The District Court held that it was so held, finding specifically "that the municipality of Miami Beach exercised its police power in regulating this match and it was held under the auspices of the VFW Post No. 3559." We do not agree, as the evidence is overwhelming to the contrary, and the Trial Judge's ruling is clearly erroneous. Fed. R. Civ. P. Rule 52(a).

In order to circumvent the prohibitory statute against the promotion of pugilistic exhibitions, it is apparent that an arrangement was made to use the name of Veterans of Foreign Wars, Post 3559 of Miami, Florida, as sponsor of the fight. The consideration paid to the VFW for the use of their name was the nominal sum of $500 cash. Two members of VFW Post 3559 testified that approximately twenty of their members were in attendance on the night of the fight. The Secretary of the Miami Beach Boxing Commission testified that he knew that Dundee-MacDonald was the promoter of the fight but that he actually observed members of the VFW present and that their presence was necessary in order to make the boxing contest a legal venture under the laws of Florida. He also identified sample tickets for the fight on which are printed the words "Sponsored by V.F.W. Miami Beach Post No. 3559." The same

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pal regulation shall be construed as applying to boxing exhibitions held by and under the auspices of the American legion, disabled American veterans, veterans of foreign wars of the United States, Spanish-American war veterans or companies or detachments of the Florida national guard, Y.M.C.A., junior chamber of commerce, or any college which is a member of any recognized amateur athletic association and the Circulo Cabana club, a charitable organization now in existence, whether an admission fee is charged or not; provided further, that nothing contained herein shall be construed to prohibit any municipality from exercising its police powers to regulate boxing and wrestling exhibitions held under the auspices of the above named organizations."

witness testified that the Dundee-MacDonald Enterprises had applied for and been issued a license by the Boxing Commission to stage the championship fight.

The evidence is quite clear that the VFW had nothing whatsoever to do with holding, staging or conducting the contest and that the parties to the contract were well aware of that fact. Harold Conrad, a writer and fight promoter, who was public relations director for plaintiff, Inter-Continental, and also on-the-scene agent for Inter-Continental preliminary to the fight actually taking place, acknowledged in effect that the $500 paid to the VFW was a mere gratuity. The record discloses that he was asked, in that part of his deposition offered in evidence by defendants' counsel, as an admission against interest, the following:

> "Q. Do you know what, if any, connection that organization had with this fight?
> "A. Well, I think there was some kind of a handout that these guys had been having for years in this town. You can't put on a fight unless they are at the door. I don't know what the details are. I have seen them down through the years."

The Chairman of VFW Post 3559 Boxing and Wrestling Committee, Max Lenchner, testified that VFW had nothing to do with staging the fight. He said that he was told by Mr. Dundee, "We are having a fight next week, Max. Be here with the men." And Lenchner said, "That's the way it is." He further said the check for $500 was received by him, which was paid "for the use of its name in sponsorship of the fight." Then he was asked:

> "Q. Now, you had nothing whatever to do with putting on this fight, did you?
> "A. That's right. I have nothing to do with it whatsoever.
> "Q. Neither did the Veterans of Foreign Wars?
> "A. That's correct."

Benjamin Peiser, a member of the VFW Post Committee, who attended the fight and remained at the doorway in order in keep out unauthorized people, testified that the $500 check paid to the Post "was given to our organization for attending that fight." He said he had nothing to do with the taking of tickets, however, and that neither he nor the VFW in any way contributed to staging, holding, conducting or putting on the fight.

Frank Lewis, who was an officer and member of the board of directors of all of the MacDonald Corporations and comptroller of MacDonald, testified that VFW Post 3559 had nothing to do with holding, staging or conducting the Liston-Clay fight. He said:

> "Q. And in your capacity as treasurer of the corporation you participated in the negotiation of all of the phases of holding this fight as you just described; is that correct?
>
> "A. Yes, definitely.
>
> "Q. What, if anything, did the Veterans of Foreign Wars, Post 3559, have to do with holding, staging or conducting the Liston-Clay fight that was held on February 25, 1964?
>
> "A. Nothing. We used their name and paid them a contribution for that.
>
> "Q. Do you remember how much the contribution was?
>
> "A. Yes, $500. This was arranged for by Chris Dundee and we paid it, Dundee-MacDonald Enterprises, Inc."

Lewis also testified that "everybody was trying to get into the fight free" and so he restricted the number of people from the Veterans of Foreign Wars which had submitted a list of over thirty names to an authorization of twenty only.

Oscar Markovich, who handled the vending concessions at the Liston-Clay fight at Miami Beach, and who has been at many fights at the Convention Hall as refreshment concessionaire, also testified that the VFW Post had nothing to do with staging the fight. He said:

"Q. Were there Veterans of Foreign Wars present at the fight?

"A. Yes, there was.

"Q. Isn't it a fact that they perform no function other than being present, sir?

"A. I have never seen them perform any functions but I have seen them there.

"Q. They are just merely present?

"A. So far as I can see.

"Q. They don't take tickets?

"A. No, sir.

"Q. They don't usher people to seats?

"A. No, sir.

"Q. And they don't have anything to do with any refreshment concessions?

"A. Nothing whatsoever.

"Q. And they have nothing to do with brining [sic] [bringing] the fight to the auditorium or staging it, that you know of?

"A. No, sir."

The record further shows that MacDonald (or Dundee-MacDonald Enterprises, Inc.) performed all the necessary acts requisite to promoting and staging the fight. They leased the convention hall, worked out arrangements with crowd-control and seating engineers, employed firms to take care of publicity and advertising, contracted for the printing of tickets and programs, and actively handled every facet of promoting and conducting the fight. The conclusion is inescapable that the Liston-Clay fight was not held under the auspices of the VFW. The use of the

organization's name was a mere fiction to avoid the prohibitory Florida statute, and representation on the printed tickets of VFW sponsorship was an obvious subterfuge designed to present a nominal compliance with the Florida law.

A second issue before us is the finding by the District Court that inasmuch as MacDonald had the obligation of conducting a lawful fight under the contract, defendants were estopped from asserting noncompliance with the exclusion clause of Florida Statutes Annotated § 548.03.

The law of Florida is to the contrary. The Supreme Court of Florida, in *Montsdoca v. Highlands Bank & Trust Co.*, 1923, 95 So. 666, 668, said: "The doctrines of estoppel and waiver do not in general apply in transactions that are forbidden by statute or that are contrary to public policy." We cited *Montsdoca* and used the quoted language with approval in *Northwestern National Casualty Company v. McNulty,* 5 Cir., 1962, 307 F. 2d 432, 442-443. See also *State v. City of Hialeah,* Fla. App. 1963, 156 So. 2d 675, 676, reiterating the non-applicability of the doctrine of estoppel to transactions either forbidden by statute or contrary to public policy. The rule applies regardless of whether the party asserting the invalidity of the contract is himself a participant in the wrongdoing.[5] In *Local No. 234, Etc. v. Henley & Beckwith, Inc.*, Fla., 1953, 66 So. 2d 818, 823, the Supreme Court of Florida said:

> "The cases are legion that a contract against public policy may not be made the basis of any action either in law or in equity. . . .

5. See also Citizens' Bank & Trust Co. v. Mabry, Fla., 1931, 136 So. 714, 717; Robert G. Lassiter & Co. v. Taylor, Fla., 1930, 128 So. 14, 19; LeJohn Manufacturing Company v. Webb, D. C. Cir., 1955, 222 F. 2d 48, 52; National Transformer Corp. v. France Mfg. Co., 6 Cir., 1954, 215 F. 2d 343, 361; Standard Lumber Co. v. Butler Ice Co., 3 Cir., 1906, 146 F. 359, 362.

> "Agreements in violation of public policy are void because they have no legal sanction and establish no legitimate bond between the parties. Brumby v. City of Clearwater, supra. *Because of this the defendant may assert the invalidity of the contract even though he is a participator in the wrong.* This is so for the reason that one who has entered into a contract or undertaking which is violative of public policy owes to the public the continuing duty of withdrawing from such an agreement." (Emphasis supplied.)

It has also been said that illegality of a contract as a defense is allowed not to protect the defendant but as a disability to the plaintiff, *National Transformer Corp. v. Finance Mfg. Co.*, 6 Cir., 1954, 215 F. 2d 343, 361; *Roberts v. Criss*, 2 Cir., 1920, 266 F. 296. The evidence shows that the parties, pursuant to their contract, accomplished an unlawful purpose by virtue of an apparent subterfuge. Under the circumstances, the law will leave the parties where it finds them, and no relief shall be granted because of the dominant public interest. See *National Transformer Corp v. France Mfg. Co.*, supra at 361. CF. *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U. S. 353, 357, 51 S. Ct. 476, 477; *Steele v. Drummond*, 275 U. S. 199, 207, 48 S. Ct. 53, 55 (1927).

REVERSED.